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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 60.

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

against

CHARLES E. O'ROURKE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER

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Opinions Below

The opinion and the dissenting opinion of the United States Court of Appeals for the Second Circuit reversing the judgment of the United States District Court for the Eastern District of New York are reported in 194 F. 2d 612, 613, 615, and appear in the record at pages 48-51 and 52-53. The opinion of the United States District Court dismissing the complaint is reported in 99 F. Supp. 506, and appears in the record on pages 40-44.

Jurisdiction

The judgment of the United States Court of Appeals was entered on February 26, 1952 (R. 53-54). The petition for a writ of certiorari was filed on May 12, 1952, and was granted on October 13, 1952 (R. 55). Jurisdiction is conferred upon this Court to review this case by writ of certiorari under Title 28, United States Code, Section 1254.

Questions Presented

The principal questions raised by the holding of the Court of Appeals are as follows:

1. Whether the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U. S. C., §§ 901 *et seq.*, was applicable and afforded an exclusive remedy for respondent's injury; or

2. Whether the Federal Employers' Liability Act, 35 Stat. 65, as amended, 53 Stat. 1404, 45 U. S. C., §§ 51 *et seq.*, or the Safety Appliance Act, 27 Stat. 531, 45 U. S. C., §§ 1 *et seq.*, could properly be invoked therefor.

Respondent was injured on a car float of the petitioning railroad company. The float was a vessel of more than 18 tons, used in the transportation of railroad cars across the river to and from Harsimus Cove, Jersey City, New Jersey, and at the time of the injury was lying there in navigable water (R. 36-37, 38, 39). Respondent, while "engaged in the defendant's business of interstate commerce" (R. 4), was performing a part of his assigned duties as a regular member of a drill crew unloading freight cars from a car float (R. 10, 11). While on one of the freight cars releasing the hand brakes for its removal from the car float, he was knocked or fell from the car, striking the platform of the car float and thereby sustaining an injury, as is more fully set forth in the Statement below.

Statutes Involved

The statutes here involved are the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U. S. C., §§ 901 *et seq.*, hereinafter sometimes referred to as the "Harbor Workers' Compensation Act" or as the "Act"; Federal Employers' Liability Act, 35 Stat. 65, as amended, 53 Stat. 1404, 45 U. S. C., §§ 51 *et seq.*, and Safety Appliance Act, 27 Stat. 531, 45 U. S. C., §§ 1 *et seq.* The pertinent provisions thereof are set forth in the Appendix (*infra*, p. 17).

Statement

When this case appeared on the trial calendar of the United States District Court for the Eastern District of New York, counsel for both plaintiff and defendant called the attention of the judge, Hon. Harold M. Kennedy, to the fact that the pleadings raised a serious question whether the respondent could invoke the Federal Employers' Liability Act and the Safety Appliance Act (upon which statutes his complaint was based) (R. 40), or whether his remedy was exclusively under the Longshoremen's and Harbor Workers' Compensation Act, as alleged in the answer (R. 5, 6). Having ascertained that there was no factual dispute concerning the nature of respondent's employment when injured or the place of the occurrence of the accident, the learned judge suggested a preliminary determination of the proper remedy (R. 40). Thereupon counsel for petitioner moved to dismiss the complaint under the Federal Rules of Civil Procedure, Rules 12(b)(6), 56(b) and 56(d), upon the pleadings, a part of the deposition of plaintiff and concessions in the affidavits (R. 3, 5, 8 ff, 35, 36, 37, 38, 39).

The conceded facts are as follows: Having theretofore been doing stevedoring work (R. 8), respondent was em-

ployed by petitioner, The Pennsylvania Railroad Company, at its Harsimus Cove Yards, Jersey City, New Jersey (R. 9, 36, 38, 39). As a part of his duties, he was required to work on car floats and to assist in placing freight cars on, or removing them from, car floats owned by petitioner and in which they had been, or were to be, transported in interstate commerce across the Hudson River to or from Harsimus Cove (R. 3, 4, 10, 36, 37, 38, 39, 40, 41) where the car floats were moored in and upon navigable waters of the United States (R. 36-37, 38, 39). Respondent was a regular member of one of the drill crews which were so engaged in the placing on, or removal of the freight cars from, the car floats (R. 10, 11, 38, 39). His drill crew generally consisted of himself and an engineer, a fireman, a conductor and another brakeman. In the general course of their duties in removing freight cars from the car floats, they would go down to the water with an engine and pusher, something like a flat car, and the pusher would be backed by the engine onto the car float and coupled up with the head freight car (R. 12), sometimes by the other brakeman and sometimes by himself (R. 10); the hand brakes would be released and the freight cars, coupled together, drawn from the car floats (R. 9-12). Respondent's particular job in this respect was generally to release the hand brakes on the freight cars. Obviously the procedure would be reversed and he would tighten the brakes when placing freight cars on the car float.

On the occasion of the accident the customary procedure was followed. After taking off cars from three or four other floats (R. 12), the pusher was backed by the engine onto a car float with two tracks, and coupled up by respondent with the head freight car on the north side (R. 13). Respondent climbed from the pusher onto the platform of the car float and then onto one of the box cars to release the hand brakes. Having done so on several box cars, he states that he came to the car in question

on the south side, attempted to release the hand brake, was thrown off balance, fell from the box car onto and striking the platform of the float suffering an injury which was the basis of this action (R. 18-24, 36, 37, 38, 39).

Since the accident and after some hospitalization, respondent has been working as a brakeman at Pennsylvania Station, New York, with the same rate of pay (R. 28). Respondent alleges in the complaint that at the time of the accident he "was engaged in the defendant's business of interstate commerce" (R. 4).

In addition to the above concessions, respondent stipulated that the accident occurred on navigable waters of the United States (R. 36-37; 38, 39); that petitioner had complied with all of the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended; that the car float on which the accident occurred was a vessel weighing more than 18 tons; that respondent was neither a master or member of the crew of the vessel, nor an officer or employee of the United States or any agency thereof at the time of the accident and was not and did not fall within the other statutory exceptions; and finally, that petitioner made or offered to make payments to him pursuant to and in compliance with the provisions of the said act (R. 36, 37, 38, 39, 40, 41).[1]

Upon the admissions and concessions by and on behalf of the respondent (R. 40-41), Judge Kennedy granted the motion to dismiss the complaint with an opinion that respondent's exclusive remedy was under the said Harbor Workers' Compensation Act (R. 40-44), and judgment was entered thereon (R. 46-47). As heretofore stated, the United States Court of Appeals for the Second Circuit

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[1] The limitation of time for filing claims under the Harbor Workers' Compensation Act does not begin to run until the determination of this suit (§ 13(d), 33 U. S. C. § 913(d)).

reversed with an opinion by District Judge Brennan (R. 48 *et seq.*) and by Circuit Judge Clark, dissenting (R. 52 *et seq.*).

Specification of Errors to Be Urged

The Court of Appeals for the Second Circuit erred:

(1) In holding that the Longshoremen's and Harbor Workers' Compensation Act did not afford respondent an exclusive remedy for his injury.

(2) In holding that the Longshoremen's and Harbor Workers' Compensation Act was not applicable.

(3) In holding that the Federal Employers' Liability Act and the Safety Appliance Act were applicable and afforded a remedy for respondent's injury.

(4) In reversing the order and judgment of the District Court, which dismissed the complaint on the ground that the Longshoremen's and Harbor Workers' Compensation Act was applicable and afforded respondent an exclusive remedy.

ARGUMENT

The Longshoremen's and Harbor Workers' Compensation Act is applicable and affords respondent an exclusive remedy.

The Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U. S. C. §§ 901 *et seq.*, provides a compulsory system of compensation, irrespective of the employer's fault, for disability or death resulting from injury to employees occurring upon the navigable waters of the United States, if the employer has employees engaged in maritime employment, in whole or in part, upon

the navigable waters of the United States, and if recovery may not validly be provided by state compensation laws, with certain exceptions not herein important (§§ 2, 3, 33 U. S. C. §§ 902, 903). See *supra*, page 5. The appellant railroad company, operating car floats in navigable waters, is an employer within the meaning of Section 2, subdivision (4) of the said Harbor Workers' Compensation Act (see *infra*, p. 10), and has complied with the provisions of said Act (R. 36, 37, 38, 39).

As hereinbefore stated, the District Court granted a motion to dismiss the complaint on the ground that the Harbor Workers' Compensation Act provided an exclusive remedy (R. 40, 45). The Court of Appeals reversed, holding that respondent was not employed in "maritime employment" (R. 48), Judge Clark dissenting.

The respondent was injured on a vessel, lying in navigable waters (R. 36-37, 38, 39). He was engaged in the performance of a maritime service, for loading and unloading a ship's cargo is of that character. Upon its proper performance depend in large measure the safe carrying of the cargo and the safety of the ship itself; it is a service absolutely necessary to enable the vessel to discharge its maritime duty. *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52. The danger from a heavily loaded freight car inadequately secured and moving back and forth on a car float is readily apparent. With the brake improperly set, there is danger to the cargo and danger to the vessel. The comparable service of unloading, loading and stowing cargo in the hold of a ship has traditionally been regarded as constituting "maritime employment." *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52; *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205; *Northern Coal Co.* v. *Strand*, 278 U. S. 142; *Employers' Liability Assurance Corp.* v. *Cook*, 281 U. S. 233. Yet it contains no more inherent possibilities of danger than placing a car on or removing a car from a car float. The loading of cargo into a freight car on a car

float has been held to be a maritime service, *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128, although without the attendant danger to cargo and vessel involved in the instant case.

In the *Nogueira* case, likewise brought in the District Court under the Federal Employers' Liability Act, the judgment dismissing the complaint upon the ground that the Harbor Workers' Compensation Act was applicable and afforded an exclusive remedy, was affirmed by the Circuit Court of Appeals and by this Court. In that case the employee was injured when thrown to the floor of a car float belonging to the defendant railroad company. The float was used in transporting cars and at the time of the injury was lying in navigable waters at a pier in New York Harbor. The injured employee was one of a gang of railroad freight handlers, at the time of the injury, loading freight into one of the railroad cars. He was not stowing cargo in the hold of a vessel involving the safety of the ship. He was not a longshoreman loading cargo into a ship. He was a railroad employee, at the time loading freight into a railroad car on a car float for transportation and not for local storage. This Court, after referring to *Imbrovek*[2] and other cases, in a unanimous opinion, held that from the standpoint of maritime employment it obviously made no difference whether the freight was placed in the hold or on the deck of a vessel or whether the vessel was a car float or a steamship; that a car float in navigable waters is subject to maritime law like any other vessel; that a gang of railroad freight handlers in loading freight from the dock into one of the freight cars was engaged in maritime employment; that there was no distinction between loading and unloading in that respect, and that for an injury suffered on board the car float, the Harbor Workers' Compensation Act afforded an exclusive remedy.

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[2] *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52.

In that case the employee's duties were maritime, not because loading freight into a railroad car is inherently maritime, but because loading it into a car on a car float is an essential part of transportation by water. There is obviously no distinction between loading freight into a railroad car on a float and placing a freight car on the float in so far as the character of the employment is concerned. Each is essential to enable the car float to perform its maritime function.

Moreover a railroad freight car, when being loaded upon, transported by, or unloaded from a car float moving in interstate commerce and in and by navigable water, is maritime cargo and nothing more. The securing of that freight car on the car float involves the safety of cargo and vessel to a much greater extent than the traditional loading of a ship by longshoremen or stevedores. The fact that such a freight car had become a specialized cargo secured on the float principally by the application of its own brakes rather than by cables, ropes or other means, does not make it any less a maritime cargo and its stowage any less a maritime employment. Certainly one engaged in removing the safety protection at the end of the voyage by loosening the brakes to accomplish the unloading of the cars is also engaged in maritime employment. Nor can it make any difference that such cargo is removed on its own wheels instead of the wheels of a hand truck. Furthermore, in the instant case the transition of the car from maritime cargo to a freight train on land had not taken place. The engine and pusher had not even been coupled to the cars (R. 13). As stated by Circuit Judge Clark in his dissenting opinion: "the *Nogueira* case seems wholly controlling in both its reasoning and its holding" (R. 52).

Until the decision of the Court of Appeals below, it was generally thought to be settled that railroad employees on a car float engaged in loading into or removing cargo from cars on vessels or placing on or removing freight cars from car floats or car ferries, lying in navigable waters, were covered by the Harbor Workers' Compensation Act. *No-*

gueira v. *New York, N. H. & H. R. Co.*, 281 U. S. 128; *Buren* v. *Southern Pacific Co.*, 50 F. 2d 407 (9th Cir.), *cert. denied* 284 U. S. 638; *Gussie* v. *Pennsylvania R. Co.*, 1 N. J. Super. 293, 64 A. 2d 244, *cert. denied* 338 U. S. 869; *Richardson* v. *Central R. Co. of N. J.*, 233 App. Div. 603, 253 N. Y. S. 789; see also *Job* v. *Erie R. Co.*, 79 F. Supp. 698 (S.D.N.Y.).

The court below accordingly erred in holding that respondent was not engaged in "maritime employment"; and that the designation as brakeman bespeaks a specialized railroad employment quite apart from "maritime service" (R. 49, 51). In holding that releasing hand brakes is distinctively a railroader's job accompanied with particular risks peculiar to the business of railroading alone, the learned court completely overlooked the additional hazards in removing the cars, resulting, for example, from the ebb and flow of the tide and from the fact that navigable water generally is moving and not static. This additional risk was undoubtedly recognized by respondent trained as he was in stevedoring work (R. 8). The court below also seems to have been under the misapprehension that Nogueira was engaged in the traditional task of loading and stowing cargo in the vessel instead of placing freight in a freight car on a car float (R. 49).

The objection that respondent's maritime duties were part time only was answered in *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244, 247, in which this court overruled such an objection stating that such employees were expressly included in the Act. (§ 2(4), 33 U.S.C. § 902(4)).

There can be no doubt that petitioner was an employer within the meaning of the Harbor Workers' Compensation Act. Employers are defined in Section 2, subdivision (4) (33 U. S. C., § 902(4)) as follows: "The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry

dock)." The term is not otherwise defined either with respect to the nature or the scope of the enterprises in which the employer is engaged. As the Chief Justice stated,[3] the definition is manifestly broad enough to embrace a railroad company, provided it has employees who "are employed in maritime employment, in whole or in part, upon the navigable waters of the United States"; and no exception is made of the employees of a railroad company in maritime service on navigable waters or with respect to the question whether such employment was in connection with an extension of railroad service.

As reported to and first passed by the Senate, the bill contained a provision in Section 3 excepting "an employee of a common carrier by railroad engaged in interstate or foreign commerce or in commerce within any Territory or the District of Columbia if the injury from which the disability or death results occurred while the employee was employed in such commerce." Senate Report No. 973, 69th Congress, First Session. This exception was eliminated from the bill as finally passed. Until Congress writes that exception into the Act, respondent and other such employees are within its exclusive coverage (§ 5, 33 U. S. C. § 905). It was suggested in the District Court that the said exception, eliminated by Congress, was in effect re-enacted by the 1939 amendment[4] to the Federal Employers' Liability Act, respondent citing *Zientek* v. *Reading Co.*, 93 F. Supp. 875 (E. D. Pa.) therefor. That argument was denied by Judge Kennedy (R. 41-42), abandoned in the Court of Appeals and disavowed by

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[3] *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128, 132, 134.

[4] The amendment (53 Stat. 1404) added the following language to § 1 of the act (45 U. S. C. § 51): "'Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.'"

that court (R. 51, 53), after the decision in *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187, 190, in which case this Court said: "the Amendment has no effect on the 'right or remedy' of railway employees but merely redefines for the purposes of the Federal Employers' Liability Act the scope of the word 'employee' to include certain persons not theretofore covered, because they were not directly engaged in interstate or foreign commerce." Respondent was directly engaged in interstate or foreign commerce and accordingly the amendment did not affect his status.[5] The interpretation enunciated by the *Zientek* case has not been followed. *Job.* v. *Erie R. Co.*, 79 F. Supp. 698 (S. D. N. Y.); *Gussie* v. *Pennsylvania R. Co.*, 1 N. J. Super. 293, 64 A. 2d 244, *cert. denied* 338 U. S. 869; *Byrd* v. *New York Central System*, 6 N. J. Super. 568, 70 A. 2d 97; see also *Rist* v. *Pittsburgh and Conneaut Dock Co.*, 104 F. Supp. 29 (N. D. Ohio).

Since the instant case falls within the ambit of the decision in the *Nogueira* case, recovery for respondent's injury through state workmen's compensation proceedings may not validly be provided by state law.

The case accordingly is not within the twilight zone referred to in *Davis* v. *Department of Labor*, 317 U. S. 249.

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[5] See Senate Report No. 661, 76th Congress, First Session, commenting upon the 1939 amendment as follows: "'This amendment is intended to broaden the scope of the Employers' Liability Act so as to include within its provisions employees of common carriers who, while ordinarily engaged in the transportation of interstate commerce, may be, at the time of injury, temporarily divorced therefrom and engaged in intrastate operations. * * * The adoption of the proposed amendment will, to a very large extent, eliminate the necessity of determining whether an employee, at the very instant of his injury or death, was actually engaged in the movement of interstate traffic.'"

When Congress desired to eliminate railroad employees from the coverage of the Longshoremen's and Harbor Workers' Compensation Act, it did so expressly as in the act for the employees of the District of Columbia. Act of May 17, 1928, c. 612, 45 Stat. 600. See *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128, 138.

In the *Davis* case, neither the employer nor the employee was shown to have been engaged in the business of transportation by water in interstate commerce, navigation or in any general maritime activity. The employer was a construction and engineering company and the employee a structural steel worker. The job undertaken by the employer and in which the employee was to assist "was to dismantle an abandoned drawbridge which spanned the river." A part of the task of the employee was to cut steel from the bridge to be lowered to a barge by which it was to be moved about 250 feet away for storage to await delivery to a local purchaser. The employee while on the barge was knocked or fell into navigable water. The entire enterprise was purely local in nature.[6] It had no concern

[6] The local nature of the activities involved in the *Davis* case and in the cases cited therein, page 253, footnote 2, is apparent: *Davis* v. *Department of Labor*, 317 U. S. 249 (structural steel worker employed by a construction and engineering company engaged in the dismantling of a bridge); *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469 (carpenter working on a partially completed vessel); *Alaska Packers Association* v. *Industrial Accident Commission*, 276 U. S. 467 (employee engaged as fisherman and for work in connection with canning operations on land injured pushing a small boat into navigable water); *Millers' Indemnity Underwriters Co.* v. *Braud*, 270 U. S. 59 (diver employed by a shipbuilding company removing timber from abandoned set of ways); *State Industrial Board of N. Y.* v. *Terry and Tench Co.*, 273 U. S. 639 (employee engaged in the construction of a pier); *Rosengrant* v. *Havard*, 273 U. S. 664 (lumber inspector grading and tallying lumber being removed from barges; *Sulton Ry. & Timber Co.* v. *Department of Labor*, 277 U. S. 135 (employee of lumber company assembling logs in booms for towage on a navigable river); *United States Casualty Co.* v. *Taylor*, 64 F. 2d 521 (4th Cir.), *cert. denied* 290 U. S. 639 (workman engaged in the construction of a newly launched, uncompleted ship); *New Amsterdam Casualty Co.* v. *McManigal*, 87 F. 2d 332 (2d Cir.) (carpenter employed by a construction company engaged in the construction of a lighthouse); *In Re Herbert's Case*, 283 Mass. 348, 186 N. E. 554 (employee of garbage disposal company sweeping the deck of a scow in navigable waters within the City of Boston); see also *Bethlehem Steel Co.* v. *Moores*, 335 U. S. 874 (shipyard employee repairing a ship in dry dock); *Baskin* v. *Industrial Accident Commission*, 338 U. S. 854 (shipyard employee ("materialman") working usually on shore or on ships under construction injured on a ship being repaired).

with maritime activity, at least beyond the locality involved. It was upon such facts and the presumption of validity of the state compensation act that this Court held that the determination of the administrative body that the case was purely of local concern should be sustained.[7] It was upon somewhat similar facts, that Justices Holmes, Stone and Brandeis dissented from the decision in *Baizley Iron Works* v. *Span*, 281 U. S. 222, 232, which denied relief under a state compensation act to a blacksmith helper, employed by the Iron Works, who was injured when painting angle irons on a vessel lying in navigable waters, on the same day that they concurred in the unanimous decision of this Court in the *Nogueira* case, *supra*.

In the instant case, the employer was engaged in navigation, in transportation by water in commerce between the states and the employee was performing a regular assignment assisting in such duties at the time of injury.

This Court has consistently held that the loading and unloading of vessels engaged in interstate or foreign commerce by water is employment of general maritime significance, and which in accordance with the provisions of the Constitution, Article III, Section 2, must be subjected to the exclusive maritime jurisdiction of the Federal Government. *Nogueira* v. *New York; N. H. & H. R. Co.*, 281 U. S. 128; *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205; *Northern Coal Co.* v. *Strand*, 278 U. S. 142; *Employers' Liability Assurance Corp.* v. *Cook*, 281 U. S. 233; *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52.

Moreover, the rights of the parties in the instant case have been defined by an administrative determination. Although not an adjudication in respondent's case, the United States Employees Compensation Commission, the administrative body charged by Congress with the enforcement of the Harbor Workers' Compensation Act (Opinion

[7] See also *Bethlehem Steel Co.* v. *Moores*, 335 U. S. 874.

29, January 20, 1928; 6 American Maritime Cases 413 (1928)), has ruled that "employees of a railroad company who go aboard vessels and render services in connection with putting on board, or taking off loaded or empty cars are engaged in maritime employment," and entitled to the exclusive remedy provided by the Act, a determination that we have been informed has been consistently followed.

Prior to the decision below, it was generally thought that a definite guide had been established for such workers. But now, notwithstanding the large number of railroad employees in all parts of the country, who have, for full or part time, assigned to them the duties of placing on and removing freight cars from ferries and car floats in and upon navigable rivers, harbors or lakes, the employers and employees are left "in a chartless morass" with no standard to guide them (R. 53). If the railroad employee is loading or unloading freight from a freight car on a car float, the Harbor Workers' Compensation Act is applicable and is his exclusive remedy, *Nogueira* v. *New York, N. H. & H. R. Co., supra,* 281 U. S. 128, but if he is assisting in unloading a car-float by releasing the hand brakes to remove the freight cars, he will not be entitled to such protection if the majority opinion below is sustained.

Now uncertainty has been substituted for certainty; indefiniteness for definiteness; insecurity for security. Moreover the decision involves a large class of employees throughout the country having identical or substantially similar duties in loading and unloading car floats, uniform in structure and in function, and necessarily so because of the compulsory interchange of freight cars, thereby furnishing an unusual opportunity to provide a workable standard for employers and employees.

Conclusion

The Longshoremen's and Harbor Workers' Compensation Act affords a remedy for respondent's injury on navigable waters while employed by petitioner in the maritime service of loading and unloading a car float, a vessel of more than 18 tons, used to transport freight cars in interstate commerce across navigable waters, and upon the proper performance of whose task depended the safety of the vessel. Respondent was not a member of the ship's crew and did not fall within the other exceptions of the Act. Since the remedy provided by the said Act is exclusive, the Federal Employers' Liability Act is not applicable. Such is the unanimous decision of this Court in the *Nogueira* case.

It is respectfully submitted that the judgment of the United States Court of Appeals should be reversed and that of the United State District Court affirmed.

Respectfully submitted,

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THOMAS F. AHRENSFELD,
of Counsel.

New York, N. Y., November 14, 1952.

Appendix

The relevant provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U. S. C. §§ 901 *et seq*, are the following:

"§ 902. *Definitions.* When used in this chapter—

. . . . .

(3) The term 'employee' does not include a master or a member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(4) The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock.) . . . ."

"§ 903. *Coverage.* (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; . . . ."

"§ 904. *Liability for compensation.* (a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this chapter. In the case

of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

(b) Compensation shall be payable irrespective of fault as a cause for the injury."

"§ 905. *Exclusiveness of liability.* The liability of an employer prescribed in section 904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."